BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
R. H. OSBRINK)

Appearances:

For Appellant: Frank M. Benedict, Attorney at Law

For Respondent: Burl D. Lack, Chief Counsel; Paul L. Ross, Associate Tax Counsel

OPINION ON REHEARING

In our original determination of this matter we upheld, on the authority of Corrough v. McColgan, 21 Cal. 2d 481, and Helvering v. Stuart 317 U. S. 154, the inclusion by the Franchise Tax Commissioner in the personal income of the Appellant of one-half of the undistributed income from irrevocable trusts created by the Appellant and his wife for the benefit of each of their two minor children. Upon rehearing, Appellant asks that we either

> (1) completely reverse our decision by holding that none of the trust income is taxable to him, or
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> (2) modify our decision by holding as taxable to him only that portion of the income from the trusts which is equivalent to the amounts actually expended by Appellant from his own funds for the support of the two minor beneficiaries.

The two trust instruments in question are identical except for the name of the beneficiary, and provide that so much of the net income of the trust as in the trustee's sold discretion may be necessary for the' "comfort, maintenance and education" of the beneficiary shall be distributed in monthly or other convenient installments to or used for the benefit of the beneficiary and that "any unexpended income shall be accumulated and

added to the principal of the trust estate." We are unable to distinguish between these provisions and the terms of the trust instrument involved in Curtis A. Herberts, 10 T. C. 1053, which provided that "such portion of the net income from the trust estate as in the sole discretion of the Trustee is reasonably necessary for the care, maintenance, support and education" of the beneficiary was to be distributed quarterly, or at other intervals, The Tax Court there held the trust to be within the rule of the Stuart case. We conclude, therefore, that a complete reversal of our decision is not in order.

We sustained the action of the Commissioner on the assumption that the Borroughs and Stuart cases required the entire trust income to be attributed to the grantor because of the possibility of its use for the discharge of his legal obligation. We are now of the view, however, that inasmuch as the contention that the entire income was in excess of the amount necessary to discharge such obligation was not presented for consideration therein, those cases are not decisive on that issue, Hopkins v. Commissioner of Internal Revenue, 144 Fed. 2d 683; Joseph Weil, 3 T. C. 579.

In Joseph Weil the Commissioner of Internal Revenue contended that under the rule of the Stuart case the entire income of a trust was taxable to the grantor where such income could be used to pay premiums on life insurance policies constituting part of the trust corpus, the grantor, as trustee, having retained the power to add additional policies to the trust estate. The Tax Court refused to give to the Stuart case the construction contended for and limited the grantor's liability for tax to an amount equivalent to the premiums on policies then in existence and part of the trust estate.

In Hopkins v. Commissioner of Internal Revenue the combined income for one of the taxable years of trusts for the benefit of two minor children was $252,563.94. Stating that the -rationale of the Stuart case "does not foreclose the rule that Section 167 fixes a maximum of income from a maintenance trust of a sum equal to the income of the trust usable for the discharge of the settlor's contractual, common law or statutory liability" the Court limited the maximum sum taxable to the grantor out of the trust income to an amount equal to the sum actually expended by him for his childrens' support.

The trusts here under consideration were established on October 1, 1942. The combined income of the

trusts for the remainder of that year was $47,280.28. No part of such income was used or distributed for any purpose during the year in question. To say that the parental obligation to support two children for a period of three months is to be measured by any such amount appears completely unrealistic. It has been indicated to us that the amounts expended by Appellant for that purpose for the entire taxable year were only a fractional part of that amount.

We now conclude, accordingly, on the authority of the Hopkins case, that for the year 1942 the maximum amount taxable to Appellant from the trust income under Section 12(h) of the Personal Income Tax Act (now Section 18172 of the Revenue and Taxation Code) is equal to his actual expenditures for the support of his two minor children in the last three months of that year.

O R D E R

Pursuant to the views expressed in the opinion on rehearing of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 18596 of the Revenue and Taxation Code that the action of the Franchise Tax Commission& (now succeeded by the Franchise Tax Board) on the protest of R, H. Osbrink to a proposed assessment of-additional personal income tax in the amount of $2,252.62 for the year 1942 be and the same is hereby modified. The Franchise Tax Board is hereby directed to compute the additional tax for said year in accordance with said opinion on rehearing and to notify R. H. Osbrink of such computation. If the Appellant and the Franchise Tax Board are in agreement as to the amount of the additional tax, they shall promptly file with this Board a statement of such amount of additional tax; if they are not so in agreement they shall file a statement to that effect, Further action herein will be deferred for a period of thirty days for the filing of the statement as herein required; upon the filing thereof such further order as may appear appropriate will be entered herein.

Done at Sacramento, California, this 22d day of July, 1952, by the State Board of Equalization.

J. L. Seawell, Chairman

_____, Member

Geo. R. Reilly, Member

J. H. Quinn, Member

Thomas H. Kuchel, Member

ATTEST: Dixwell L. Pierce, Secretary